

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

PITTSBURGH-CANFIELD CORPORATION *
et al., *

Debtors. *

WHEELING-PITTSBURGH STEEL *
CORPORATION, *

Plaintiff, *

vs. *

McSTAY ENGINEERED PRODUCTS *
COMPANY, *

Defendant. *

CASE NUMBER 00-43394

ADVERSARY NUMBER 02-4633

M E M O R A N D U M O P I N I O N

There are two matters before the Court, which were heard by the Court on April 19, 2005. Each of the parties has filed a motion, which would be dispositive of the case, as follows: Plaintiff Wheeling-Pittsburgh Steel Corporation ("Wheeling-Pitt") filed a Motion of Plaintiff for an Order of Judgment by Default (the "Motion for Default Judgment") on February 28, 2005. Defendant McStay Engineered Products Company ("McStay") filed a Motion to Dismiss (the "Motion to Dismiss") on March 14, 2005. In response to the Motion for Default Judgment, McStay filed Defendant's Response to Plaintiff's Motion for Order of Judgment

by Default (the "Response to Motion for Default Judgment") on March 14, 2005. In response thereto, Wheeling-Pitt filed its Reply in Support of Plaintiff's Motion for an Order of Judgment by Default (the "Reply") on March 21, 2005. McStay then filed Defendant's Motion for Leave to File Supplemental Memoranda on Issues Related to Plaintiff's Motion for an Order of Judgment by Default (the "Motion for Leave") on April 1, 2005, followed by Wheeling-Pitt's Response to Defendant's Motion for Leave to File Supplemental Memoranda (the "Response to Motion for Leave") filed on April 8, 2005. In response to McStay's Motion to Dismiss, Wheeling-Pitt filed its Brief in Opposition to Defendant's Motion to Dismiss (the "Brief in Opposition") on March 25, 2005. Both parties appeared at the hearing on these motions on April 19, 2005. Both parties were represented by counsel and neither party submitted any evidentiary testimony.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b). This is a core proceeding pursuant to 28 U.S.C. § 157(b). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

F A C T S

On November 16, 2000 (the "Petition Date"), Wheeling-Pitt and eight of its affiliates filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code. On November 14, 2002, Wheeling-Pitt timely filed a Complaint for Avoidance of Trans-fers, Recovery of Avoided Transfers and Other Relief against

McStay (the "Complaint"). The Complaint sought, among other things, to recover One Hundred Ninety-Six Thousand One Hundred Eleven and 78/100 Dollars (\$196,111.78) in preference payments made by Wheeling-Pitt to McStay. On May 15, 2003, the Court issued a Summons to McStay; on May 23, 2003, Wheeling-Pitt caused the Summons and Complaint to be served on McStay by first-class United States Mail, in accordance with the rules and procedures of the Court.¹ Accordingly, McStay's answer or other responsive pleading to the Complaint was due on June 14, 2003. McStay failed to timely answer the Complaint, but did file its Answer to Plaintiff's Complaint (the "Answer") on May 19, 2005 - one full month after the hearing on the respective motions - without leave of the Court.

Pursuant to the Court's request, on November 4, 2004, a Joint Adversary Status Report (the "Joint Status Report") with respect to the adversary proceeding was filed by Wheeling-Pitt.

¹Due to the sheer volume of adversary proceedings (mostly avoidance actions) that were filed in these related bankruptcy proceedings, as well as other Chapter 11 cases pending before this Court, the Clerk's Office was unable to issue summonses within the time frame contemplated by the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure. Wheeling-Pitt filed a Motion to Extend Certain Procedures for Preference and Fraudulent Transfer Actions (the "Motion for Order Extending Certain Procedures"), which requested additional time in which the summonses could be timely served. On February 19, 2003, this Court entered an Order Extending Certain Procedures for Preference and Fraudulent Transfer Actions (the "February 19, 2003 Order"), which provided that Wheeling-Pitt could delay presenting a summons to the Clerk of this Court for the Court's issuance for service on each defendant until on or before May 15, 2003. The February 19, 2003 Order also provided that the 120-day period set forth in Fed. R. Civ. P. 4(m) to make service of the summons and complaint upon defendant would be extended in each avoidance action to Friday, September 12, 2003, or within such longer period as might be subsequently ordered by the Court. The February 19, 2003 Order was docketed in the main case, which was the case of Pittsburgh-Canfield Corporation, Case Number 00-43394, but was not docketed in the case of Wheeling-Pittsburgh Steel Corporation or the adversary proceeding against McStay, Case Number 02-4633.

On November 19, 2004, this Court signed the Case Management and Discovery Order, pursuant to which discovery was to be completed by January 18, 2005 and all dispositive motions were to be filed no later than February 28, 2005. The Joint Status Report stated that: "Wheeling-Pitt believes that such service was received by the Defendant. Defendant reserves the right to assert the defense of failure of service of process." (Joint Status Report at ¶ 2.) Paragraph 9 of the Joint Status Report reads: "Additional Information to Assist the Court: None."

Wheeling-Pitt timely filed its Motion for Default Judgment pursuant to the Case Management and Discovery Order of November 19, 2004. As set forth above, the responses, replies and other motions followed.

D I S C U S S I O N

Motion for Default Judgment

Wheeling-Pitt filed its Motion for Default Judgment stating that a Complaint and Summons had been served, but that McStay had failed to answer. As a consequence, Wheeling-Pitt, in reliance on FED. R. CIV. P. 55(b)(2), made applicable pursuant to FED. R. BANKR. P. 7055, requests the issuance of a judgment by default.

McStay's Response to Motion for Default Judgment argues that the Motion for Default Judgment should be denied because McStay was not served with the Summons and Complaint within the 120-day time limit provided in FED. R. CIV. P. 4(m).

In its Reply, Wheeling-Pitt states that it perfected service of process upon McStay within the period required by FED. R. CIV. P. 4(m) and the February 19, 2003 Order of this Court. Wheeling-Pitt argues that McStay received service of process within the time period permitted and reiterates that it is entitled to judgment by default because McStay failed to plead or otherwise respond to the Complaint within the time allotted by the Civil Rules. Wheeling-Pitt also argues that it is entitled to a default judgment because McStay failed to assert its affirmative defense of insufficient service of process prior to the Court-imposed dispositive motion deadline of February 28, 2005. Wheeling-Pitt states that although McStay had actual knowledge of this deadline, it chose not to file its Motion to Dismiss within the designated period. Wheeling-Pitt asserts that McStay has waived its ability to now assert any affirmative defenses because, for over 22 months, it made no effort to assert any such defense.

McStay, in its Motion for Leave, counters that its first actual knowledge that the Court had extended the 120-day time limit for serving summons and complaint was Wheeling-Pitt's reference thereto in its Reply, which was filed on March 21, 2005. McStay then sets forth a litany of alleged defects, including that it was not served with the Motion for Order Extending Certain Procedures nor was it served with a copy of the February 19, 2003 Order.²

²As the Court expressly stated at the hearing, McStay was not entitled to service of the Motion for Order Extending Certain Procedures because McStay had not made an appearance in the case up to that period of time. Likewise, it was not

McStay further states, "[d]espite a telephone conversation undersigned counsel had with Nathan Wheatly, counsel for plaintiff, that occurred on March 7, 2005, where Mr. Wheatly was specifically asked, 'am I missing something here or was service not obtained within 120 days', [sic] Mr. Wheatly did not advise undersigned counsel of the Court's extension[.]" (See Motion for Leave at 2.) McStay goes on to request leave to file additional memoranda relating to certain issues regarding the sufficiency of service of the Motion for Order Extending Certain Procedures, the exercise of jurisdiction over McStay, whether McStay has "otherwise defended" Wheeling-Pitt's action so as to preclude judgment being entered against it pursuant to FED. R. CIV. P. 55(b)(2), whether Wheeling-Pitt's Motion for Default Judgment was procedurally proper and whether good cause was shown why judgment by default should not be entered against McStay.³

Wheeling-Pitt responds to McStay's Motion for Leave by stating that McStay cannot demonstrate good cause to support its motion because the parties previously had an opportunity to fully brief the issues before the Court. Additionally, Wheeling-Pitt alleges that McStay's "negligence in defending this suit does not constitute good cause." (See Response to Motion for Leave at 1.)

Motion to Dismiss

entitled to service of a copy of the February 19, 2003 Order entered in response to that motion.

³The Court did not grant McStay's Motion for Leave.

McStay filed its Motion to Dismiss pursuant to FED. R. CIV. P. 12(b)(5) asserting that service was not timely under FED. R. CIV. P. 4(m). McStay alleges that because Wheeling-Pitt filed its Complaint on November 14, 2002, the 120-day time limitation provided in Rule 4(m) expired on March 15, 2003. Since the Clerk first issued Summons on May 15, 2003, the Summons was not timely. As a consequence, McStay alleges that insufficient service of process constitutes a basis for dismissal of the adversary proceeding pursuant to FED. R. CIV. P. 12(b)(5), made applicable to bankruptcy cases pursuant to FED. R. BANKR. P. 7012(b). McStay further argues that service was not proper under FED. R. BANKR. P. 7004(b)(3) because the Certificate of Service showed that service of the Summons and Complaint was made to "McStay Engineered Products Company, Attn: President, Member or Manager." McStay contends that service was insufficient since the documents had to be served upon a specifically named officer or managing agent.

In its Brief in Opposition, Wheeling-Pitt asserts that service of the Summons and Complaint was timely since it was made within the 120-day period set forth in FED. R. CIV. P. 4(m), as extended by the February 19, 2003 Order. Wheeling-Pitt argues that the Court issued a Summons to McStay on May 15, 2003 and, on May 23, 2003 - well within the time period of September 12, 2003 ordered by the Court - Wheeling-Pitt caused the Summons and Complaint to be served on McStay. Wheeling-Pitt further argues that McStay allowed approximately 22 months to pass after receiving

service of process and more than two weeks after the Court-ordered dispositive motion deadline to allege that Wheeling-Pitt failed to perfect service of process. Wheeling-Pitt states that it not only perfected service of process in a timely manner, it met all requirements of Rule 7004(b)(3) because the process directed to McStay's "President, Member, or Manager" was sufficient, citing *Schwab v. Associates Commercial Corp. (In re C.V.H. Transport, Inc.)*, 254 B.R. 331, 333 (Bankr. E.D. Pa. 2000) (bankruptcy court held that addressing notice to "officer" or "agent" satisfies Bankruptcy Rule 7004(b)(3)). Wheeling-Pitt also alleges that McStay has waived its affirmative defenses because of the delay in asserting them.

A N A L Y S I S

The Court finds that neither party has totally clean hands in dealing with each other with respect to this case.

McStay acknowledges that it received the Summons and Complaint, but felt that it could refrain from answering or filing any other pleading because they were not served within the requisite 120-day period. McStay took a calculated risk that its position with respect to timely service might not be correct. In this case, McStay was incorrect because service of the Summons and Complaint was timely. Although the Court acknowledges that it might be difficult to find the February 19, 2003 Order on the docket, McStay never inquired of Wheeling-Pitt about the timeliness

of service nor did it file a motion to dismiss the case on that basis. Doing either of these things would have put McStay on notice that the time period for service had been extended by this Court. Not only did McStay fail to determine if the 120-day period for service had been extended by the Court when it discussed the Joint Status Report with Wheeling-Pitt, McStay never asserted that it had an affirmative defense of insufficiency of service of process; it merely "reserve[d] the right to assert the defense of failure of service of process."

The Court's purpose in requesting a joint status report was to require the parties to engage in discussion. Both parties chose to "keep their powder dry" and not reveal any information to the other party in formulating the Joint Status Report. They did so at their peril.

For its part, Wheeling-Pitt knew that the February 19, 2003 Order was docketed only in Debtor's main case, which was Pittsburgh-Canfield Corporation. Perusing the docket in the Wheeling-Pittsburgh Steel Corporation case would not have tipped off any defendant that an order extended the time for service of process. In addition, Wheeling-Pitt acknowledges that it received a letter from McStay, dated May 27, 2003 (shortly after service of the Summons and Complaint), which indicated that McStay did not think that there had been any preferential transfers. Although the letter clearly does not constitute an answer or other responsive

pleading as required by the Federal Rules of Civil Procedure, Wheeling-Pitt was on notice that McStay contested the preference action. Wheeling-Pitt either deliberately or negligently failed to obtain any information from McStay with respect to its alleged defenses when it formulated the Joint Status Report. Neither party conducted any discovery with respect to this case. If Wheeling-Pitt had served any discovery on McStay (since it knew from the May 27, 2003 letter that McStay disputed that preference payments had been received), McStay might have been forced to file something with the Court.

This Court is dismayed that the parties have proceeded so irresponsibly with this litigation. Although McStay's conduct may or may not constitute an "appearance" in the case, its participation in the Joint Status Report, coupled with the May 27, 2003 letter, and the Response to Motion for Default Judgment, are enough, in this Court's opinion, to deny the Motion for Default Judgment. Entry of a motion for default judgment is within the discretion of the Court and this Court does not find that judgment is appropriate under the circumstances. The bases for the Motion to Dismiss, *i.e.*, that service was not timely perfected and was insufficient, are erroneous. This Court finds that service to McStay's President, Member or Manager was sufficient without naming such officer and was timely made within the period prescribed by FED. R. CIV. P. 4(m) and the February 19, 2003 Order. As a consequence, the Motion for Default Judgment and Motion to Dismiss

are both denied.

McStay filed an Answer to the Complaint as of May 19, 2005. Although McStay failed to seek leave of the Court to file the Answer, the Court will permit the filing of such Answer.

This Court imposes a new discovery cutoff with respect to this adversary proceeding; all discovery shall be completed by September 1, 2005. No further dispositive motions may be filed without leave of the Court. The parties shall request a telephonic status conference at the end of the discovery period to discuss the next steps.

An appropriate order shall enter.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

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O R D E R

For the reasons set forth in this Court's Memorandum Opinion entered this date, Wheeling-Pitt's Motion for Default Judgment is denied. McStay's Motion to Dismiss is also denied. Discovery shall be completed no later than September 1, 2005.

IT IS SO ORDERED.

HONORABLE KAY WOODS
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Opinion and Order were placed in the United States Mail this _____ day of June, 2005, addressed to:

MICHAEL E. WILES, ESQ., Debevoise & Plimpton
LLP, 919 Third Avenue, New York, NY 10022.

JAMES M. LAWNICZAK, ESQ., RONALD M. McMILLAN,
ESQ. and NATHAN A. WHEATLEY, ESQ., Calfee,
Halter & Griswold LLP, 1400 McDonald Investment
Center, 800 Superior Avenue, Cleveland, OH
44114.

KIRK W. LIEDERBACH, ESQ. and J. ROSS HAFNEY,
JR., ESQ., McStay Engineered Products Company,
5001 Mayfield Road, Suite 301, Cleveland, OH
44124.

SAUL EISEN, United States Trustee, BP America
Building, 200 Public Square, 20th Floor, Suite
3300, Cleveland, OH 44114.

JOANNA M. ARMSTRONG